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No. 298

In the Supreme Court of the United States

OCTOBER TERM, 1960

CHARLES O. PORTER, PETITIONER

v.

CHRISTIAN A. HERTER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
Department of Justice, Washington 25, D.C.

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While this case was pending in the Court of Appeals for the District of Columbia Circuit in 1959, the petitioner filed a petition for writ of certiorari before judgment in the Court of Appeals, in an effort to have his case considered by this Court along with *Worthy* v. *Herter* and *Frank* v. *Herter,* in which petitions for certiorari were then pending: On December 7, 1959, certiorari was denied in *Worthy* and in *Frank* and also in the petitioner's case. 361 U.S. 918.

The Court of Appeals, which had also decided the *Worthy* (270 F. 2d 905) and *Frank* (269 F. 2d 245) cases, then heard the petitioner's case on the merits and on April 14, 1960 affirmed the action of the District Court in granting the respondent's motion for

summary judgment. The present petition[1] seeks review of that judgment of the Court of Appeals.

1. The petitioner, a Member of Congress from the State of Oregon, holds a valid passport containing the following endorsement (J.A. 1):

> This passport is not valid for travel to the following areas under control of authorities with which the United States does not have diplomatic relations: Albania, Bulgaria,[2] and those portions of China, Korea and Viet Nam under Communist control.

On June 10, 1959, the petitioner wrote to the Secretary of State requesting, on behalf of himself and a number of persons who were to accompany him, permission to visit Communist China (J.A. 3). The petitioner's stated purpose was to learn about conditions and trade potentialities and other facts relating to policy and legislative aspects (J.A. 2, 4; Pet. 3).

By letter of July 2, 1959, the Secretary replied in part as follows (J.A. 10–11):

> In 1952 the Department established the policy of not validating passports for Communist China. This policy is based on a number of considerations, among which are the fact that a state of unresolved conflict still exists between the United States and Communist China stemming from the latter's aggression against the

[1] The question presented in the present petition is substantially the same as the question presented in the earlier petition. (Compare the question presented at p. 2 of the Petition in No. 488, October Term, 1959 with that presented in the present petition at p. 2).

[2] Restrictions on travel to Bulgaria were removed May 12, 1959. Department of State Press Release No. 322.

United Nations in Korea and the fact that the Peiping regime continues to resort to force from time to time in the Taiwan Strait area. The emergency declared by President Truman in 1950 is still in effect.

Another factor of importance is that in the absence of diplomatic relations with Communist China, it is not possible for the Government to provide the customary protection to Americans traveling on the China mainland. In addition, the Communist Chinese have consistently maltreated Americans and continue to hold American citizens in prison as political hostages despite their pledge of September 10, 1955 to release them expeditiously. Another and important factor is the effort of the Communist Chinese to utilize trade and cultural contacts to promote political objectives hostile to our interests.

* * * * *

In your case, I might add that as a Member of Congress your visit would be interpreted throughout Asia as well as by the Communist Chinese as a basic change in policy at the very time when the Communists are engaged in liquidating the Tibetan revolt, threatening war in the Taiwan Straits and showing increasing arrogance and contempt for international law and decency.[3]

The petitioner's application was denied.

The petitioner subsequently was authorized by the Committee on Post Office and Civil Service of the House of Representatives to travel to Okinawa and Japan in his official capacity (J.A. 25), "to take care

[3] Cf. the prohibitions of 18 U.S.C. 953 (the Logan Act).

of matters pertaining to civilian employee problems" (J.A. 26). However, the petitioner at no time requested or received Congressional authority to travel to Communist China (J.A. 22, 24, questions 3, 4).

On August 27, 1959, the petitioner filed a complaint in the United States District Court for the District of Columbia, seeking injunctive relief, and also asking a judgment declaring that as a member of Congress he has a right to travel to Communist China in the interest of his legislative duties and that the Secretary's refusal to issue him a passport valid for travel to China is unlawful, and violates his constitutional rights as a citizen and a Congressman (J.A. 1–5). On September 14, 1959, the petitioner filed a motion for preliminary injunction (J.A. 14–15), followed the next day by a motion for summary judgment (J.A. 13). The Secretary then filed a motion to dismiss, or, in the alternative, a cross-motion for summary judgment (J.A. 21). The District Court, by order dated September 30, 1959, denied the petitioner's motions and dismissed the complaint (J.A. 27).

2. The petitioner concedes that the central issue involved in this case—the authority of the Secretary of State, in the implementation of foreign policy, to refuse to validate passports of American citizens for travel to Communist China—"is the same as that challenged in [the] *Worthy* and *Frank*" cases (Pet. 15). However, the petitioner again seeks to distinguish his case from *Worthy* and *Frank* (as he did in his earlier petition) on the ground that he is a Congressman and that the refusal of the Executive to validate his passport for travel to Communist

China interferes with his "legislative functions". (He alleges that his proposed investigation of conditions in Communist China constitutes an exercise of such function.) (Pet. 15–25.)

The investigatory powers of Congress can be exercised only pursuant to valid authorization. Although the petitioner was authorized by his Committee Chairman to travel to Okinawa and Japan to investigate matters pertaining to civilian employees of the United States Government in those areas, he has at no time received authorization from the House or any of its committees to travel to Communist China on behalf of Congress. The petitioner's status as a member of Congress cannot, in the circumstances of this case, raise, as he claims, an issue of separation of powers as between the Executive and Legislative Branches of the Government. As the court of appeals held, the "issue here is merely between a claim of an inherent right asserted in his individual capacity by a member of the legislative branch, and the plenary power of the executive branch asserted by it in relation to and in its conduct of the Nation's foreign affairs." (Pet. 29.)

The petitioner's case is governed by the decisions in the *Worthy* and *Frank* cases, *supra*, which, as we asserted in our previous briefs in opposition in those cases, were correct. There is no occasion for further review by this Court.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.

SEPTEMBER 1960.

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